No. 08-716

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WATSON CHAPEL SCHOOL DISTRICT, *et al.*,

Petitioners,

—v.—

CHRIS LOWRY, BY, THROUGH AND WITH HIS MOTHER WENDY CROW; COLTON DOUGAN, BY, THROUGH, AND WITH HIS FATHER FRANK DOUGAN AND MOTHER LEIGH DOUGAN; AND MICHEAL JOSEPH, BY, THROUGH, AND WITH HIS MOTHER HEIDI JOSEPH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Eighth Circuit properly apply *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), to a case involving punishment of public secondary school students for peacefully protesting school policy by wearing black armbands that did not violate the school dress code and did not cause any disruption?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
INTRODUCTION 1
COUNTER-STATEMENT OF THE CASE 2
REASONS FOR DENYING THE PETITION 4
CONCLUSION 8
APPENDIX 1a
Final Decree; dated October 31, 2007 ..... 1a

TABLE OF AUTHORITIES

Cases

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) 6, 8

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 6, 8

Holloman ex rel. Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004) 6

Morse v. Frederick, 551 U.S. ___, 127 S.Ct. 2618 (2007) 6, 8

Newsom ex rel. Newsom v. Albemarle County School Bd., 354 F.3d 249 (4th Cir. 2003) 6

Shanley v. Northeast Independent School Dist., Bexar County, Tex., 462 F.2d 960 (5th Cir. Tex, 1972) 7

Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969) ..... *passim*

West Virginia Board of Educ. v. Barnette, 319 U.S. 624 (1943) 9

INTRODUCTION

Petitioners present this case as a challenge to the constitutionality of a school dress code. It is not. On the morning of trial, Petitioners stipulated that Respondents were disciplined for wearing black armbands to school "because the black armbands signified disagreement with the student apparel policy." Pet.App. at 8a-9a, 12a; BIO App. at 1a. Petitioners also stipulated that "the wearing of black armbands caused no material disruption or substantial interference with the school." Pet. App. at 9a, 12a; BIO App. at 1a. The District Court found that the black armbands worn by Respondents did not violate the school dress code, Pet.App. at 36b-37b, and the Eighth Circuit affirmed that factual finding. *Id.* at 5a-6a, 12a.

Given these findings and concessions, the only issue properly raised by the petition for certiorari is whether students can be disciplined for wearing black armbands that do not violate the school dress code and are not disruptive, simply because school officials disagree with the message they convey. Both lower courts found that Petitioners had violated the First Amendment on these facts. Those decisions represent nothing more than the straightforward application of principles this Court first announced forty years ago when it held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 506 (1969). In the decades since, this Court has never questioned *Tinker*'s core holding. The judgment

below is manifestly correct and does not merit plenary review by this Court.

COUNTER-STATEMENT OF THE CASE

On October 6, 2006, Respondents and other students wore black armbands to school to protest a mandatory school uniform policy that the Watson Chapel School Board had adopted the previous spring. The policy, which was controversial, did not prohibit students from wearing armbands so long as the armbands did not cover their school uniforms. Indeed, after the policy was adopted, armbands that bore the Watson Chapel School District logo were sold at a school event, and worn at school, as were others, including one that bore the Christian Message, "Live Pure: 1 Timothy 4:12. Students who wore those armbands were not punished. Pet. App. at 6a & n.5, 23b-25b. By contrast, Respondents were disciplined for wearing their black armbands to school, allegedly for violation of the school dress code.

When asked to explain at a preliminary injunction hearing why Respondents were disciplined for wearing armbands when other students were not, a school official testified that Respondents' armbands were "a direct protest against the dress code policy." Pet.App. at 35b-36b. That concession was reinforced by two stipulations that Petitioners made on the morning of trial. As noted above, Petitioners stipulated that Respondents were disciplined "because the black armbands signified disagreement with the student apparel policy." *Id.* at 8a, 12a. In addition, Petitioners stipulated that "the wearing of

the black armbands caused no material disruption or substantial interference with school." *Id.* at 9a, 12a.

Based on these stipulations, the District Court concluded that the material facts were no longer in dispute and that Petitioners had violated Respondents' First Amendment rights under the standard set forth in *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503. The District Court enjoined Petitioners from "disciplining any student from wearing a band substantially similar [to the armband worn by Respondents] around the wrist or any part of the arm not touching or covering any part of the student's school uniform." BIO. App. at 2a. Respondents were also awarded nominal damages for the violation of their First Amendment rights. *Id.*[1]

The Eighth Circuit affirmed. Pet.App. at 32a. In particular, the Eighth Circuit noted the following: First, Respondents' armbands did not violate the school dress policy because they did not "overlap any part of the uniform." *Id.* at 5a-6a & n.6. Thus, unlike a challenge to the school dress code itself, this case "does not relate to the regulation of the length of skirts or the type of clothing" worn by students at school. *Id.* at 14a. Second, Respondents' armbands were not disruptive. *Id.* at 16a. Third, Respondents

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[1] Respondents' complaint also included a challenge to the school apparel policy but, despite Petitioners' claim to the contrary, that issue is not before the Court. The District Court granted Petitioners' summary judgment motion on the constitutionality of the student apparel policy, Pet.App. at 27b-28b, and Respondents did not appeal that ruling to the Eighth Circuit. Pet.App. at 8a, 16a.

were disciplined because their armbands "signified disagreement with the student apparel policy." *Id.* at 12a. In short, the Eighth Circuit held, "*Tinker* is so similar in all constitutionally relevant facts that its holding is dispositive." *Id.* at 16a.

REASONS FOR DENYING THE PETITION

THIS CASE PRESENTS A STRAIGHFORWARD APPLICATION OF *TINKER*, DOES NOT CREATE ANY CONFLICT AMONG THE CIRCUITS, AND DOES NOT RAISE ANY UNRESOLVED QUESTIONS OF NATIONAL IMPORTANCE.

In *Tinker*, school officials sought to punish students who had worn black armbands to school in a non-disruptive, passive expression of protest against the Vietnam War. This Court held that school officials could not ban students from wearing black armbands merely because school officials had an "urgent wish to avoid the controversy which might result from the expression," 393 U.S. at 510. As the *Tinker* Court explained, the "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," and restrictions on protected speech cannot be justified unless there is a "showing that the students' activities would materially and substantially disrupt the work and discipline of the school." *Id.* at 508, 510-511.

This Court has never deviated from that holding. To the contrary, even in cases where the

Court has upheld the actions of school officials against First Amendment challenge, it has reaffirmed the bedrock principle that "students cannot be punished merely for expressing their personal views on the school premises . . . unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)(quoting *Tinker*, 393 U.S. at 512-13.); *Morse v. Frederick*, 551 U.S. ___, 127 S.Ct. 2618, 2636 (2007)(Kennedy & Alito, JJ., concurring)(noting that "the opinion of the Court reaffirms the central holding of *Tinker*); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)(noting that students have "the classroom right to wear Tinker's armband, but not Cohen's jacket.")

Federal and state courts throughout the country have understood and applied this core holding of *Tinker* for four decades. *See, e.g., Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1279 (11th Cir. 2004)(ruling that student could not be punished under *Tinker* for silently holding his fist in the air during the Pledge of Allegiance); *Newsom ex rel. Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 257 (4th Cir. Va.,2003)(applying *Tinker*'s "material and substantial disruption" standard to preliminarily enjoin school's ban on all images or messages related to weapons); *Shanley v. Northeast Independent School District*, 462 F.2d 960, 970 (5th Cir. 1972)(holding that students may not be

disciplined under *Tinker* for the non-disruptive, off-campus distribution of underground newspaper).

Thus, at least since *Tinker* was decided in 1969, it has been black letter law that the First Amendment protects students against school discipline based on speech that is not disruptive and does not interfere with the work of the school. The judgment below represents nothing more than the routine application of this well-settled principle.

Petitioners attempt to manufacture a split of authority by noting that circuits differ in their approach to the constitutionality of content-neutral school uniform policies. Pet. at 6-7. The constitutionality of content-neutral school uniform policies, however, is not before the Court. *See* n.1, *supra*. Petitioners have admitted, and both the District Court and Eighth Circuit found, that Respondents did not violate the school dress code by wearing black armbands to school as a non-disruptive protest against the school apparel policy. Instead, Respondents were disciplined simply and solely because of the protest message they sought to convey. Both lower courts found that Petitioners' actions under these circumstances violated the First Amendment. There is no circuit conflict on that fundamental issue, and Petitioners have not identified one.

Petitioners' contention that the legal standards governing this case have been called into question by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, and *Morse v. Frederick*, 551 U.S. ___, 127 S.Ct. 2618 (2007), is similarly misguided.

Hazelwood upheld the authority of school officials to control the contents of the official school newspaper, which the Court characterized as a form of school-sponsored speech because it was part of the curriculum, supervised by the faculty, and "published" by the school under its own banner. Respondents black armbands have none of those indicia of school sponsorship or control. *Fraser* involved vulgar speech at an official school assembly. This case involves neither. *Morse* concerned the ability of a school to prohibit what it viewed as the promotion of illegal drug use by students at an official school function. Respondents' non-disruptive speech obviously had nothing to do with drug use or any other illegal activity. Most fundamentally, each of the Court's post-*Tinker* cases carefully distinguished its facts from *Tinker*'s. In this case, by contrast, the Eighth Circuit aptly noted that "the facts here nearly mirror *Tinker*." Pet.App. at 12a.

Finally, this case does not call into question the deference owed to school officials when they are exercising their responsibilities in a manner that is consistent with the Constitution. It has been clear since *Tinker* that students cannot be "confined to the expression of those sentiments that are officially approved." 393 U.S. at 511. It is equally clear that Petitioners' actions in this case violated *Tinker*. Deference to school officials does not place their actions "beyond the reach of the Constitution." *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). This Court has never ruled otherwise.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully Submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

CHRIS LOWRY, by, through, and with his Mother WENDY CROW;
COLTON DOUGAN, by, through, and with his Father FRANK DOUGAN and Mother LEIGH DOUGAN; and
MICHAEL JOSEPH, by, through, and with His Mother HEIDI JOSEPH — PLAINTIFFS

v. No. 5:06CV00262 JLH

WATSON CHAPEL SCHOOL DISTRICT, *et al.* — DEFENDANTS

FINAL DECREE

At the trial beginning on September 11, 2007, the defendants stipulated that the discipline imposed on Chris Lowry, Colton Dougan, and Michael Joseph for wearing black armbands to school on October 6, 2006, was imposed because the black armbands signified disagreement with the student apparel policy and that the wearing of the black armbands caused no material disruption or substantial interference with school. In light of these stipulations, the Court held that facts necessary to establish a violation of the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution as interpreted in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), were no longer in dispute. The Court entered judgment on the jury

verdict and granted plaintiffs' motion to amend the judgment to include an award of nominal damages. The issues now before the Court are those relating to what equitable relief, if any, should be granted.

The preliminary injunction entered in this action on October 20, 2006, in part will be made permanent and in part will be dissolved. The defendants are hereby permanently enjoined from disciplining any student for wearing a band substantially similar to plaintiffs' Exhibit 13 presented at the October 19, 2006, hearing in this matter around the wrist or any part of the arm not touching or covering any part of the student's school uniform.

The portion of the preliminary injunction that enjoined the defendants from using the events of October 6, 2006, in the progressive discipline of Chris Lowry, Colton Dougan, or Michael Joseph, or otherwise using the events of October 6 to the detriment of those three students is now moot and is therefore dissolved. Chris Lowry is no longer a student in the Watson Chapel School District. Colton Dougan and Michael Joseph are students in the Watson Chapel School District, but no evidence has been introduced that there is any likelihood that an event from the school year 2006-2007 would affect the progressive discipline on a student in subsequent school years.

Count IV of the amended complaint challenged the constitutionality of the student literature policy in effect in the 2006-2007 school year. The Court held that that policy was

unconstitutional. A different policy was adopted for the 2007-2008 school year. Plaintiffs did not amend their pleadings to challenge the constitutionality of the student literature policy currently in effect. Because the student literature policy in effect in 2006-2007 is no longer in effect, there is no threat that that policy will be enforced so as to cause harm to either of the two plaintiffs who are still enrolled in the Watson Chapel School District. Therefore, no injunction will issue regarding the student literature policy.

IT IS SO ORDERED this 31st day of October, 2007.

/s/
J. LEON HOLMES
UNITED STATES
DISTRICT JUDGE